

1 Defendants filed a reply on September 6, 2018. On September 17, 2018, Plaintiff filed a request to file
2 a surreply to Defendants' reply.

3 On November 1, 2018, the Court granted Plaintiff's request to file a surreply, and issued
4 Findings and Recommendations recommending Defendants' exhaustion-related motion for summary
5 judgment be denied, subject to an evidentiary hearing pursuant to Albino v. Baca, 747 F.3d 1162,
6 1170-71 (9th Cir. 2015), if requested by Defendants.

7 On May 15, 2019, an evidentiary hearing was conducted before the undersigned, in which the
8 evidence and witness testimony was heard and admitted.

9 II.

10 ALLEGATIONS OF COMPLAINT

11 On November 8, 2016, Plaintiff observed Defendants Pena, Moreno, Segura, and Hinojosa
12 escorting inmate Contreras. Plaintiff heard Contreras yelling at the Defendants that he was suicidal
13 and homicidal and did not want to go in the cell with Plaintiff. Contreras requested to be sent to the
14 crisis bed unit, to be placed in another cell or to be sent to administrative segregation. Defendants
15 refused and Contreras told them "I will hurt myself I will hurt anyone." Defendant Pena stated, "we
16 don't care this is Corcoran you need to go in the cell and do what you had to do." Defendant Hinojosa
17 stated, "I bet he is not going to do nothing." Defendant Segura stated, "This is Corcoran go in there
18 and do what you had to do." Defendant Moreno stated, "You are delaying count you need to go in
19 there and do what you had to do." After Plaintiff heard the threats made by Contreras and the refusal
20 of Defendants to place him in suicide watch, Plaintiff feared for his safety and pleaded with
21 Defendants to not place Contreras in his cell. Defendants ignored Plaintiff and Silva stated out loud
22 "six, o, two, us like you always do, you hear me Garcia." All the Defendants laughed out loud at
23 Silva's statement. Defendant Silva then opened Plaintiff's cell door and Contreras refused to enter the
24 cell, but Defendants Pena, Moreno, Hinojosa and Segura all forcefully pushed Contreras inside
25 Plaintiff's cell. Once inside the cell, Contreras refused to relinquish the handcuffs, he again yelled at
26 Defendants "I will hurt myself or anyone else." Plaintiff again pleaded with Defendants to move
27 Contreras out of his cell, and Defendants again ignored Plaintiff. Contreras continued refusing to give
28 up the handcuffs, after sometime he allowed staff to remove the handcuffs, and Contreras immediately

1 pushed Plaintiff and punched him in the face knocking him down to the floor and repeatedly punched
2 Plaintiff and bit him on the arm. While Plaintiff was on the floor, Defendant Moreno sprayed him
3 with pepper spray. Defendant Silva opened the cell door and Defendants proceeded to remove
4 Contreras from the cell and secured the cell door. Plaintiff continued to lay on the floor of the cell
5 while Defendant Moreno continued to spray pepper spray on him. Plaintiff was later handcuffed and
6 escorted by Defendants Hicks to the medical unit for assessment. After the assessment, Plaintiff asked
7 Defendants Hicks, Harris, and Silva to decontaminate the cell, but the Defendants refused. Plaintiff
8 thereafter refused to enter the cell, but Defendants Hicks, Harris and Silva forcefully pushed him
9 inside the cell and left him there for several days without decontamination. Plaintiff had trouble
10 breathing the toxic fumes, respiratory failure, dizziness, blurred vision, and cough.

11 After the incident, Defendants acted in concert to cover up their misconduct by filing false
12 reports. Defendant Moreno authored a false rules violation report charging Plaintiff with the specific
13 act of fighting and he lied in his report by stating he alone escorted Contreras to Plaintiff's cell and
14 both inmates got in a fighting stance and began fighting one another. Moreno also omitted from his
15 report that Contreras told them he did not want to go in the cell with Plaintiff, that he was suicidal and
16 going to herself himself or someone else, and that Plaintiff pleaded with them not to put Contreras in
17 his cell. Moreno also omitted from his report that Pena, Hinojosa, Segura and himself (Moreno)
18 forcefully pushed Contreras inside Plaintiff's cell.

19 Defendant Silva, Hicks and Harris also filed a false report about the incident by omitting that
20 after pepper spray was administered in the cell they refused to decontaminate Plaintiff's cell and when
21 Plaintiff refused to enter the cell they forcefully pushed him inside. Plaintiff was found not guilty of
22 the false rules violation charge for fighting.

23 In November 2016, Plaintiff submitted an inmate appeal regarding the incident and all of
24 Defendants' actions. Plaintiff also inquired as to the status of his appeal. However, Plaintiff's appeal
25 was not lodged, processed or responded to. Plaintiff sought relief at several different levels of review
26 all of which failed to respond to his appeal.

27 ///

28 ///

1 III.

2 LEGAL STANDARD FOR FAILURE TO
3 EXHAUST ADMINISTRATIVE REMEDIES

4 The Prison Litigation Reform Act (PLRA) of 1995, requires that prisoners exhaust “such
5 administrative remedies as are available” before commencing a suit challenging prison conditions.”
6 42 U.S.C. § 1997e(a); see Ross v. Blake, 136 S. Ct. 1850 (June 6, 2016) (“An inmate need exhaust
7 only such administrative remedies that are ‘available.’ ”). Exhaustion is mandatory unless
8 unavailable. “The obligation to exhaust ‘available’ remedies persists as long as some remedy remains
9 ‘available.’ Once that is no longer the case, then there are no ‘remedies . . . available,’ and the
10 prisoner need not further pursue the grievance.” Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005)
11 (emphasis in original) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)). This statutory exhaustion
12 requirement applies to all inmate suits about prison life, Porter v. Nussle, 534 U.S. 516, 532 (2002)
13 (quotation marks omitted), regardless of the relief sought by the prisoner or the relief offered by the
14 process, Booth, 532 U.S. at 741, and unexhausted claims may not be brought to court, Jones v. Bock,
15 549 U.S. 199, 211 (2007) (citing Porter, 534 U.S. at 524).

16 The failure to exhaust is an affirmative defense, and the defendant bears the burden of raising
17 and proving the absence of exhaustion. Jones, 549 U.S. at 216; Albino v. Baca, 747 F.3d 1166 (9th
18 Cir. 2014). “In the rare event that a failure to exhaust is clear from the face of the complaint, a
19 defendant may move for dismissal under Rule 12(b)(6).” Albino, 747 F.3d at 1166. Otherwise, the
20 defendants must produce evidence proving the failure to exhaust, and they are entitled to summary
21 judgment under Rule 56 only if the undisputed evidence, viewed in the light most favorable to the
22 plaintiff, shows he failed to exhaust. Id.

23 Defendant must first prove that there was an available administrative remedy and that Plaintiff
24 did not exhaust that available remedy. Williams v. Paramo, 775 F.3d 1182, 1191 (9th Cir. 2015)
25 (citing Albino, 747 F.3d at 1172) (quotation marks omitted). The burden then shifts to Plaintiff to
26 show that something in his particular case made the existing and generally available administrative
27 remedies effectively unavailable to him. Williams, 775 F.3d at 1191 (citing Albino, 747 F.3d at 1172)
28 (quotation marks omitted). The ultimate burden of proof on the issue of exhaustion remains with

1 Defendant. Williams, 775 F.3d at 1191 (quotation marks omitted).

2 Where “summary judgment is not appropriate,” as to the issue of exhaustion “the district judge
3 may decide disputed questions of fact in a preliminary proceeding.” Albino, 747 F.3d at 1168.
4 Whenever feasible, such questions of fact should be “decided before reaching the merits of a
5 prisoner’s claim.” Id. at 1170. “If the district judge holds that the prisoner has exhausted available
6 administrative remedies, that administrative remedies are not available, or that a prisoner’s failure to
7 exhaust available remedies should be excused, the case may proceed to the merits.” Id. at 1171.

8 Furthermore, one of the purposes of an evidentiary hearing is to enable the finder of fact to
9 evaluate the credibility of witnesses by seeing “the witness’s physical reactions to questions, to assess
10 the witness’s demeanor, and to hear the tone of the witness’s voice. . . .” United States v. Mejia, 69
11 F.3d 309, 315 (9th Cir. 1995). It is only in rare instances that “credibility may be determined without
12 an evidentiary hearing” on the documentary testimony and evidence in the record. Earp v. Ornoski,
13 431 F.3d 1158, 1169–70 (9th Cir. 2005).

14 IV.

15 ANALYSIS AND FINDINGS ON EXHAUSTION OF 16 ADMINISTRATIVE REMEDIES

17 This action is proceeding on Plaintiff’s failure to protect claim against Defendants E. Moreno,
18 Pena, H. Hinojosa, Segura and M. Silva, excessive force claim against Defendant Moreno, retaliation
19 claim against Defendants Moreno, Pena, Hinojosa, Segura and E. Silva, and failure to decontaminate
20 cell claim against Defendants D. Hick, M. Harris, and E. Silva.

21 In denying the motion for summary judgment, the Court found that a material issue of fact
22 exists as to whether Plaintiff attempted to exhaust his administrative remedies, but “due to some
23 inadvertent loss of the grievance form, or for some other reason,” prison officials took no action with
24 respect to the grievance. The Court specifically stated, “Defendants do not specifically address
25 Plaintiff’s argument that he submitted a grievance on November 11, 2016, for which he received no
26 response. Plaintiff also contends under penalty of perjury that he inquired as to the lack of response to
27 his appeal on December 22, 2016, but again received no response. Defendants point out that Plaintiff
28 has failed to attach the grievance paperwork relevant to his claims in this case. However, the lack of

1 the November 11, 2016 grievance, may be attributed to Plaintiff's claim that it was never answered or
2 returned to him. Plaintiff has submitted sufficient evidence in support of his contentions, in the form
3 of his declaration declaring facts under penalty of perjury, based on personal knowledge, that he could
4 testify about and be examined upon. See Fed. R. Civ. P. 56(c)(4)." (ECF No. at 11:10-18.)

5 An evidentiary hearing was held on May 5, 2019, Robert Perkins and Jon Allin appeared on
6 behalf of Defendants, and Plaintiff appeared pro se. Witnesses Dwayne Goree, Michelle Oliveira,
7 Kimberly Dicks, Jorge Dominquez, Sean Pugh, and Jared Cruz testified on behalf of the defense, and
8 Plaintiff testified on behalf of himself. The following exhibits were admitted into evidence: Plaintiff's
9 Exhibits 1A ,1B, 7, 8 and 14, and Defendants' Exhibits F, H, J, K, M, N, P, Q, R, T and V. At the
10 conclusion of the hearing, the matter was taken under submission for written Findings and
11 Recommendations.

12 **A. Relevant Testimony**

13 **Plaintiff** testified that on November 8, 2016, he submitted a Form 22 notifying Defendants
14 Segunda and Hinojosa that he was not ready to have a cellie, but both Defendants refused to accept the
15 Form 22. A couple days later Plaintiff submitted an inmate appeal regarding the incidents at issue in
16 this action. A couple weeks after submission of the inmate appeal, Plaintiff submitted a Form 22
17 requesting the status, but he did not receive a response.

18 On December 22, 2016, Plaintiff filed a second inmate appeal with the appeals coordinator.
19 This appeal was filed against the appeals office, identified the subject matter of the missing inmate
20 appeal, and the fact that he never received a log number or rejection for such appeal. Plaintiff did not
21 receive a response, log number, or rejection letter for the December 22, 2016, appeal.

22 Plaintiff then sent a letter to the chief of the inmate appeals, and explained that he filed two
23 inmate appeals for which he did not receive a log number, rejection letter, or return of the appeal.
24 Plaintiff received a return letter, then submitted another inmate appeal. (Plaintiff's Exhibit 7.)

25 Plaintiff then submitted a third inmate appeal, which cancelled, and he did not know what to
26 do. (Plaintiff's Exhibit 8.)

27 Plaintiff then filed the instant action on December 29, 2017.

28 ///

1 On January 18, 2017, Plaintiff was admitted to the crisis bed unit in Stockton, California. At
2 this time, all of his legal work which included his inmate appeals, and Form 22s, were in his cell at
3 Corcoran State Prison.

4 On February 24, 2017, property officer Jared Crux informed Plaintiff to go to R&R to collect
5 his property. Plaintiff was presented with a CDCR 1083 inventory property form which did not
6 include any of his legal documents. Plaintiff refused to sign the 1083 Form because he wanted all his
7 property inventoried. Plaintiff was then transferred to Mule Creek State Prison, and he did not receive
8 any of his legal property. Plaintiff then submitted an inmate appeal requesting that Corcoran State
9 Prison forward all his legal material to Mule Creek State Prison. Plaintiff received a response from
10 Corcoran stating no legal documents were located.

11 Plaintiff submitted Appeal Log No. 17-6231 (Plaintiff's Exhibit 14) to expunge the Rules
12 Violation Report he received regarding the incident on November 8, 2016. Plaintiff received the
13 second level response to this appeal on December 21, 2017. Then, went to third level review, and a
14 letter dated March 21, 2018, was sent to Plaintiff indicating the appeal was sent back to the second
15 level review for further review and to date is still pending.

16 **Dwayne Goree**, Appeals Coordinator at Corcoran State Prison testified that an inmate can file
17 a Form 602 inmate appeal for any issues. There are three levels to the appeals process. An inmate has
18 30 days to file initial appeal, 30 days to submit to the second level, then 60 days to submit to the third
19 level for response. An appeal is exhausted after a response is received from the third level of review.

20 In November 2016, an inmate could initial the appeal process by handing an appeal to an office
21 or place it in the log box in housing unit. In 2016, only the first watch sergeant (from 10:00 p.m. to
22 6:00 a.m.) had access to the log box in the housing unit. An inmate could follow-up on any appeal
23 filed by submitting a Form 22 to the appeals office or file an additional inmate appeal indicating that
24 no response to the initial appeal was received. If an appeal is lost, a subsequent appeal would be
25 allowed to be filed to re-submit the issue(s).

26 When an appeal is filed it is logged in the Inmate Tracking System, it is then screened by staff
27 to determine if emergency, then appeals staff screen for assignment of response and assign a log
28 number. If an appeal is missing information, a CDCR Form 695 is issued detailing what is wrong with

1 the appeal and what is necessary for it be accepted. An appeal can be rejected as duplicative, for filing
2 more than one non-emergency appeal within fourteen days, subject to inmate appeal restriction, no
3 supporting documentation, or filing on behalf of another inmate.

4 Defendants' Exhibit J is an Inmate Parolee Tracking System for Plaintiff which reflects that
5 Plaintiff submitted two inmate appeals in November 2016.

6 On November 7, 2016, Plaintiff submitted Appeal Log No. CSPC-3-16-05423, in which
7 Plaintiff alleged a cover-up and fabrication of information. (Defendants' Exhibit K.) On November 9,
8 2016, a Form 695 was issued in Appeal Log. No. CSPC-3-16-05423, because the appeal was missing
9 documentation. (Id.)

10 On November 8, 2016, Plaintiff submitted Appeal Log No. CSPC-3-16-05450, in which
11 Plaintiff alleged Defendants Segura, Hinojosa, and Silva refused to sign a Form 22. (Defendants'
12 Exhibit F.) The appeal was rejected on November 10, 2016, because Plaintiff had submitted more
13 than one non-emergency appeal within a fourteen-day period. (Id.)

14 On December 22, 2016, Plaintiff submitted Appeal Log No. CSPC-3-16-06159, in which
15 Plaintiff inquired as to the whereabouts of several different appeals. (Defendants' Exhibit N.) On
16 December 28, 2016, Plaintiff received a response to Appeal Log No. CSPC-3-16-06169 which
17 addressed Plaintiff's appeal history. (Defendants' Exhibit P.)

18 Between November 8, 2016 and December 28, 2016, Plaintiff did not submit any other
19 appeals. Thus, Appeal Log Nos. CSPC-3-16-05423, CSPC-3-16-05450, and CSPC-3-16-06159, were
20 the only appeals filed during this period.

21 On October 31, 2017, Plaintiff filed Appeal Log No. CSPC-8-17-6231, with regard to the
22 November 8, 2016, incident and Rules Violation Report. (Defendants' Exhibit M.) On December 21,
23 2017, Plaintiff received a second level response. (Id.) On January 19, 2018, Plaintiff appealed to the
24 third level of review. (Id.) On March 1, 2018, the appeal was referred to the appeal coordinator at
25 Corcoran State Prison for further review. (Defendants' Exhibit V.) On March 26, 2018, the second
26 level issued an amended decision. (Defendants' Exhibit M.) There is no further evidence as to this
27 appeal.

28 ///

1 **Michelle Oliveira**, Appeals Coordinator at Corcoran State Prison testified that she responded
2 to appeals filed by Plaintiff.

3 On December 22, 2016, Plaintiff submitted Appeal Log No. CSPC-3-16-06159 regarding the
4 lack of responses to several appeals. (Defendants' Exhibit N.)

5 Appeal Log No. CSPC-3-16-06159 was rejected by Ms. Oliveira on December 28, 2016,
6 because (1) it contained multiple issues and (2) there was no supporting documentation or evidence
7 attached to it. (Defendants' Exhibit P.) A CDCR Form 22 is commonly attached as documentation to
8 prove that the inmate submitted the appeal to the officer who signs that it was accepted. Plaintiff did
9 not submit a CDCR Form 22 to this appeal. (Id.) The appeals office did not receive any response to
10 this rejection letter.

11 On February 12, 2017, Plaintiff filed Appeal Log No. CSPC-2-17-00759, in which he claimed
12 that several appeals coordinators, including Ms. Oliveira did not log or respond to his appeals.
13 (Plaintiff's Exhibit 8.) On February 15, 2017, Plaintiff's appeal was cancelled because he could not
14 appeal the processing of an appeal only its cancellation. (Id.)

15 **Kimberly Dicks**, Retired Correctional Lieutenant at Corcoran State Prison testified that part of
16 her duties included interviewing inmates about staff complaints. She interviewed Plaintiff regarding
17 an incident on November 8, 2016, and prepared a confidential supplement to Appeal Log No. CSPC-
18 2-17-00719. (Defendants' Exhibit H.) Plaintiff claimed that officer sent inmates to attack him on
19 November 8, 2016.

20 Ms. Dicks interviewed Plaintiff telephonically on April 3, 2017, regarding the November 8,
21 2016, incident. Plaintiff was asked about an inmate appeal he filed, and the events which took place
22 on November 8, 2016. Plaintiff never mentioned an appeal he allegedly filed just a few days after the
23 November 8, 2016, incident. Plaintiff stated that he did not know why the incident was not reported.
24 However, a notice of unusual occurrence issued on November 8, 2016, regarding the incident between
25 Plaintiff and his cellmate. (Defendants' Exhibit H.) The interview was eventually terminated because
26 Plaintiff failed to cooperate with the inquiry.

27 ///

28 ///

1 **Jorge Dominquez**, Correctional Captain of Office of Appeals at Corcoran State Prison
2 testified that he reviews all appeals at the third level of review. Defendants' Exhibit T is an Inmate
3 Appeals Tracking Sheet for all appeals filed by Plaintiff at the third level of review.

4 On March 21, 2018, Appeal Log No. COR-17-06231 was received at the third level or review
5 and forwarded to the appeals coordinator at the second level of further for further action. (Defendants'
6 Exhibit V.) The appeal was received at the third level on January 29, 2018, and has not been
7 exhausted.

8 **Sean Pugh**, Correctional Sergeant at Corcoran State Prison testified that he was a sergeant in
9 facility 3(b) from 2008 to 2017. His duties included supervising officers, handling any situations, and
10 maintaining security in the facility.

11 In November 2016, inmate appeals were collected by him as a sergeant. He would go around
12 to each building that had lockboxes, unlock the box pull out any inmate appeals, and make sure there
13 was no contraband. Only sergeants and lieutenants of each facility had access to the lockboxes.

14 On November 11, 2016, if an appeal was submitted it would have been collected during Friday
15 night first watch. (Defendants' Exhibit R.) Mr. Pugh did not receive any complaints that appeals were
16 getting lost on facility 3(b).

17 **Jared Cruz**, Correctional Officer at Corcoran State Prison testified that he packaged the
18 property for Plaintiff on February 24, 2017. (Defendants' Exhibit Q.) Mr. Cruz completed the CDCR
19 Inmate Property Form 1083. Plaintiff told Cruz that he had no property, but he had property that he
20 had not yet received. When Cruz packaged Plaintiff's property there was no legal material to be
21 inventoried. Plaintiff never mentioned that any inmate appeal or legal property were missing.
22 Plaintiff refused to sign the property form, but did not explain why he refused to sign and never
23 mentioned anything about any legal or other property missing.

24 **B. Plaintiff Failed to Exhaust Administrative Remedies as to Claims at Issue**

25 Plaintiff does not dispute that an administrative grievance procedure was available or that he
26 was familiar with the process. Rather, as previously stated, Plaintiff contends he submitted a relevant
27 appeal in November 2016, but it was not logged or responded to, and he has no proof of submission
28 because his legal property was improperly confiscated.

1 Failure to exhaust may be excused where the administrative remedies have been rendered
2 “unavailable,” and in such a case, the plaintiff bears the burden of demonstrating that the grievance
3 process was unavailable to him through no fault of his own. Sapp v. Kimbrell, 623 F.3d 813, 822-23
4 (9th Cir. 2010); see also Ward v. Chavez, 678 F.3d 1042, 1044-45 (9th Cir. 2012) (exhaustion excused
5 where futile); Nunez v. Duncan, 591 F.3d 1217, 1224 (9th Cir. 2010) (warden’s mistake rendered
6 prisoner’s administrative remedies “effectively unavailable”); Brown v. Valoff, 422 F.3d at 939-40
7 (plaintiff not required to proceed to third level where appeal granted at second level and no further
8 relief was available). Aside from this single exception, “the PLRA’s text suggests no limits on an
9 inmate’s obligation to exhaust—irrespective of any ‘special circumstances.’... [a]nd that mandatory
10 language means a court may not excuse a failure to exhaust, even to take such circumstances into
11 account.” Ross, 136 S. Ct. at 1856.

12 The test for deciding whether a grievance procedure was unavailable uses an objective
13 standard. Albino, 697 F.3d at 1035. “[A]ffirmative actions by jail staff preventing proper exhaustion,
14 even if done innocently, make administrative remedies effectively unavailable.” Id. at 1034. An
15 inmate may demonstrate the unavailability of remedies by showing “(1) that jail staff affirmatively
16 interfered with his ability to exhaust administrative remedies or (2) that the remedies were
17 unknowable.” Id. at 1033. The inmate must make “a good-faith effort” to determine and comply with
18 a prison’s grievance procedures. Id. at 1035.

19 As an initial matter, and detrimental to Plaintiff’s contention, is the fact that on November 20,
20 2016, Appeal Log No. CSPC-3-16-05450 (submitted on November 8, 2016) was rejected because
21 Cal. Code Regs. tit. 15, § 3084.1(f).¹ Thus, even if Plaintiff had, as he alleges, filed an appeal on or
22 about November 8 or 11, 2016, based on the evidence presented at the hearing, it would have been
23 rejected for having filed too many appeals within a fourteen-day period. Furthermore, beyond
24 Plaintiff’s own testimony, there is no independent or corroborating evidence to support his contention
25 that on November 8 or 11, 2016, he submitted a grievance relative to the claims at issue in this action.

26
27 ¹ Section 3084.1(f) specifically states, “[a]n inmate or parolee has the right to file one appeal every 14 calendar days unless
28 the appeal is accepted as an emergency appeal. The 14 calendar day period shall commence on the day following the
appellant’s last accepted appeal.”

1 See, e.g., Jackson v. Baca, No. CV 12-10393-JLS (JEM), 2018 WL 1916307 (C.D. Feb. 13, 2018)
2 (inmate's vague allegations that inmate appeal turns up missing is not enough to excuse exhaustion.)
3 Here, there is no proof that Plaintiff submitted an CDCR Form 22. On December 28, 2016, Plaintiff
4 received the following response:

5 Your appeal is dated 12/22/2016. It appears you are attempting to inquire regarding the
6 whereabouts of several appeals. For future reference you must submit separate appeals for
7 each inquiry. Attached is a copy of your Appeal History. Issue #1 was assigned ap[]peal log#
8 16-5423 and was received in the Appeals Office on 11/9/2016. The appeal was rejected and
9 sent back to you via CDC Form 695 dated 11/9/2016 noting your appeal was missing
10 necessary supporting documents and all submitted documents must be legible. As of today,
11 this appeal has NOT been resubmitted. Issue #2 was assigned appeal log# 16-5450 and was
12 received in the Appeals Office on 11/10/2016. The appeal was rejected and sent back to you
13 on 11/10/2016 noting you filed more than one non-emergency appeal within (14) calendar
14 days. As of today, this appeal has NOT been resubmitted. Issue #3-you have not provided
15 enough information regarding this appeal in order for the reviewer to gather information noting
16 you have filed a multitude of appeals nor have you provided a copy of the Form 22 as a receipt
17 evidencing you submitted the alleged appeal.

18 (Defendants' Exhibit P.) Thus, just over a month after the November 8, 2016, incident Plaintiff was
19 unable to describe with sufficient specificity an appeal he allegedly filed regarding his cell living.

20 (Id.) In addition, Plaintiff submitted several other inmate appeals during the relevant time period and
21 thereafter. Lieutenant Dicks testified that Plaintiff stated he files so many inmate appeals he does
22 remember all of them. Sergeant Cruz testified that Plaintiff never mentioned any missing appeal or
23 other legal property. Furthermore, on October 31, 2017, Plaintiff filed Appeal Log No. CSPC-8-17-
24 6231, with regard to the November 8, 2016, incident and Rules Violation Report which may be an
25 attempt to exhaust the claims at issue. (Defendants' Exhibit M.) Although Plaintiff contends that his
26 legal property which included the alleged November 2016 appeal was confiscated, his claim is belied
27 by the fact that he never complained to anyone that his appeal was missing from his property.

28 Accordingly, based on the evidence presented at the hearing, the Court finds that Plaintiff did not
exhaust the claims in this action, and the action should be dismissed, without prejudice.

///

///

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

V.

CONCLUSION AND RECOMMENDATION

Based on the evidence presented at the hearing, the Court finds that Plaintiff has not exhausted the administrative remedies with respect to the claims at issue in this action, and the action should be dismissed, without prejudice.

This Findings and Recommendation will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after being served with this Findings and Recommendation, the parties may file written objections with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and Recommendation.” The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: January 28, 2020


UNITED STATES MAGISTRATE JUDGE